Supreme Court, U.S.
FILED

94 180 APR 28 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

WILKEN JONES, JR. Petitioner,

VS.

SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wilken Jones, Jr.
Route 4 Box 367
Opelousas, Louisiana 70570
(318) 826-7415

QUESTIONS PRESENTED

WHETHER THE U.S. DISTRICT COURT DID ERR WHEN IT GRANTED THE RESPONDENT'S MOTION TO DISMISS, FOR LACK OF SUBJECT MATTER JURISDICTION, AND DENIED PETITIONER'S MOTION FOR SUMMARY JUDGEMENT

TABLE OF CONTENTS AND AUTHORITIES

TABLE OF CONTENTS

	Page
PETITION	7
OPINIONS BELOW	8
JURISDICTION	8
QUESTIONS PRESENTED	3
TABLE OF CASES AND AUTHORITIES	6
CONSTITUTIONAL PROVISION INVOLVED	8
STATEMENT OF CASE	10
REASONS FOR GRANTING THIS WRIT	11
CONCLUSION	24
APPENDIX A	A1-A14
COMPLAINT	A-2
Order dated July 1, 1993 of the United States District Court for the Western District of Louisiana	A-5
Opinion of the United State Court of Appeals for the Fifth Circuit dated March 22, 1994	A-6
STATUTE: 42 U.S.C.A. 406 (a)	A-9

TABLE OF CASES AND AUTHORITIES

UNITED STATES SUPREME COURT:

	Page:
Northeastern Florida Contractors v. Jacksonville 113 S. Ct. 2297 (1993)	21
Powers v. Ohio, 111 S. Ct. 1364 (1991)	18
Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984)	15
Singleton v. Wulff, 96 S. Ct. 2868 (1976)	19
United Mine W. of A. Dist. 12 v. Illinois St. Bar Ann'n, 88 S. Ct. 353 (1967)	13
United Transportation Union v. State Bar of Michigan, 91 S. Ct. 1076 (1971)	20
Weinberger v. Weisenfeld, 420 U.S. 636 (1975)	16
Federal Cases Other:	
Allen v. Heckler, 780 F. 2d 64 (D.C. Cir. 1985)	16
Elias v. U.S. Department of State, 721 F. Supp. 243 (N.D. Ca. 1989)	18
Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980)	16
Linquist v. Bowen, 633 F. Supp. 846 (W.D. Mo. 1986)	22
Wauchope v. U.S. Department of State, 756 F. Supp. 1277 (N.D. Ca. 1991)	23
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend I	9
U.S. Const. amend V	8
STATUTES:	
42 U.S.C.A. 406 (a)	10

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

WILKEN JONES, JR., ET AL Petitioner,

Vs.

SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
From the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Wilken Jones, Jr., the Petitioner herein, pro se, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled case on March 22, 1994.

OPINIONS BELOW

The opinion and order of the United States District Court for the Western District of Louisiana are unreported, and are printed in Appendix A. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, and is printed in Appendix A.

JURISDICTION

The district court's jurisdiction was based on 28 U.S.C.A. 1361 and 28 U.S.C.A. 1331, and involved the constitutionality of the Social Security Act, 42 U.S.C.A. 406 (a). The United States Court of Appeals for the Fifth Circuit had jurisdiction over the appeal under 28 U.S.C.A. section 1291. The United States Supreme Court has jurisdiction over the appeal under 28 U.S.C.A. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The following constitutional provision relevant to the instant case is:

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present ment or indictment of a Grand Jury, Except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be de prived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

U.S. Const. Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for redress of grievances.

Statement of the Case

Petitioner filed suit, pro se, challenging the constitutionality of 42 U.S.C.A. 406 (a) in district court, CA No. 92-1365, because it violated the equal protection provision of the U.S. Constitution. 42 U.S.C.A. 406 (a) violates the equal protection provision of the fifth amendment by permitting representatives who are attorneys that are successful in representing claimants before the Secretary to have their fees withheld by the Secretary from claimants' past-due benefits. No similar provision is made for other successful representatives of claimants who are not attorneys.

Petitioner, Wilken Jones, Jr., is a citizen of Louisiana. Petitioner is a para-legal engaged in providing services to many claimants before the Secretary over the years. Petitioner has been recognized by the Secretary, in accordance with 42 U.S.C.A. section 406 (a), that he is of good character and in good repute, possessed of the necessary qualifications to enable him to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

Petitioner has a fundamental interest in this action under the equal protection provision of the fifth amendment which provides a right of each person to a constitutional guarantee of equal protection under the law. Petitioner is directly and adversely affected by the statute.

The district court, without giving reasons, granted

Respondent's Motion to Dismiss, for lack of subject matter jurisdiction, and denied Petitioner's Motion for Summary Judgement.

The U.S. Fifth Circuit Court of Appeals affirmed the district court's decision in an unreported opinion.

The Petitioner hereby appeals that decision.

Reasons For Granting This Writ

Petitioner filed suit, pro se, in district court challenging the constitutionality of the provision of the aforementioned statute contending that the challenged statute violated the equal protection provision of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

The district court ruled that it lacked subject matter jurisdiction to consider a constitutional challenge of the statute in question and dismissed the suit.

The district court does have subject matter jurisdiction over a suit challenging the constitutionality of an Act of Congress establishing the statute in question. It has long been established that it is for the court to determine what is the law.

The district court erred when it denied our motion for summary judgment. The equal protection provision of the Due Process Clause of the Fifth Amendment stands to protect us from deprivation of life, liberty, or property without due process of law. This provision serves to guarantee that individuals who are

similarly situated are treated similarly unless there is some compelling state interest.

Legal representatives that are not attorneys who practice before the Secretary are not allowed to have their fees withheld by the Secretary out of benefits awarded to claimants. Legal representatives who are attorneys who practice before the Secretary are allowed to have their fees withheld by the Secretary. This practice violates the equal protection provision of the due process clause of the fifth amendment.

The correct standard of review is strict scrutiny because the challenged statute affect some fundamental rights. The fundamental rights affected are those protected by the first amendment, including the right to assemble and petition the government for redress.

The district court and the Court of Appeals' decisions are plainly erroneous as a matter of law because these courts applied the incorrect standard of review, rationally related, when they considered whether the challenged statute, 42 U.S.C.A. 406 (a), violated the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution and found that no fundamental rights were affected by the challenged statute.

> "We start with the premise that the rights to assemble peaceably (freedom to associate) and to petition

> for a redress of grievances (access to court) are among the most precious of the liberties safeguarded by the Bill of Rights. These rights moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. All these, though not identical, are inseparable. The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." United Mine W. of A., Dist. 12 v. Illinois ST. Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 356 (1967), (internal citations omitted), (parenthesis and information within added).

The Court of Appeals which affirmed the district court's decision is plainly erroneous because the Appeals Court stated: "Moreover, it is not clear that the statutory classification, which neither proceeds along suspect lines nor infringes fundamental constitutional rights, can not be supported by any reasonable conceivable state of facts that could provide a rational basis for the classification." (Per unreported opinion, See opinion, Appendix A). This legal conclusion, that this case neither proceeds along suspect lines nor infringes fundamental constitutional rights, is not correct and is not supported by law. The district court's decision is

plainly erroneous because the district court failed to apply the correct standard of review. The correct standard of review in this case is strict scrutiny because the challenged statute affects fundamental rights. The challenged statute violates the equal protection provision of the Due Process Clause of the Fifth Amendment of the U.S. Constitution. The fundamental rights affected by the challenged statute include:

(1) The right of legal representatives to associate with persons before the Secretary free of any governmental restraint or interference and the reciprocal right of persons to associate with Petitioner.

(2) The right of persons that Petitioner represents before the Secretary to have effective legal representation of their choice free of any government restraint or interference and the reciprocal rights of the Petitioner to provide effective legal representation for those persons Petitioner represents before the Secretary free of any government restraint or interference.

(3) The right of the persons that Petitioner represents before the Secretary to have access to the courts free of any government restraint or interference.

The freedom to associate is restrained and infringed upon by the challenged statute because the challenged statute has a chilling effect on persons seeking representation before the

Secretary and upon legal representatives seeking to provide this legal service. The challenged statute works in practice to force legal representatives to look more at the ability of persons to pay for the legal service instead of focusing in on the strengths and weaknesses of the disability claim. "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the intimate to the most attenuated of personal attachments. ...(F)actors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." Roberts v. United States Jaycees, 468 U.S. 622, 104 S. Ct. 3244, 3251 (1984).

In the instant case, Petitioner is within that ambit of protection the court has recognized. Petitioner has a confidential relationship with the person he represents. The purpose of the association is to obtain the constitutionally protected rights of due process and the right to effective legal representation.

It should be noted that the statute in controversy does not provide payment of the attorney fees by the government. It only provides that the government withhold attorney fees out of the past-due benefits of a claimant who has been successful in obtaining benefits under the Act. Thus the government is not allocating limited public funds, it is a question of securing adequate representation for the claimants.

We acknowledge that Congress may set the minimum requirements necessary, allow any qualification of certification substitutions, and waive any other admission requirement it sees fit. Congress has the power to permit only attorneys or only non-attorneys to represent claimants before the Secretary if it so desires. If Congress feels that the requirements are to low it may raise them. Conversely if Congress feels that the requirements are too high it may lower them. "But... it is not the entrance requirements that are in dispute. Instead, the issue here is whether the government may withhold from... (one group of representatives) a range of benefits it has chosen to extend to similarly situated... (representatives)." Fowler V. United States, 633 F.2d 1258, 1263 (8th Cir. 1980), (parenthesis and information within added). The Fowler case involved unequal treatment between mentally retarded and non-retarded employees. In the instant case, allowing non-attorneys to be representatives "does not justify giving them Second-class status once they are on the job. See Fowler v. United States, 633 F.2d 1258, 1263 (8th Cir. 1989) (distinguishing disparate hiring criteria from disparate terms of employment once hired)." Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985). Thus "by providing dissimilar treatment for (those) who are similarly situated, the challenged section violates the Due Process Clause." Weinberger v. Weisenfeld, 420 U.S. 636, 652 (1975).

The right of persons that Petitioner represents before the

Secretary to have effective legal representation of their choice free of any government restraint or interference has been restrained and infringed upon by the challenged statute because the government is in effect promoting some legal representatives and effectively restraining other legal representatives. Legal representatives who are not attorneys and who otherwise, except for this challenged statute, would have the opportunity and ability to be retained by persons who otherwise could not afford to pay for such services prior to a hearing before the Secretary. The government by extending benefits to one group or class of legal representatives is effectively promoting that group or class of legal representatives. Also, the government by withholding or denying benefits to one group or class of legal representatives is effectively prohibiting or infringing upon the persons right to have effective legal representation of their choice free of any government restraint or interference.

Petitioner's assertion of third party rights is proper in this instance. The court has noted: "In appropriate circumstances, the federal courts have upheld a plaintiff's assertion of third party rights. Singleton, 428 U.S. at 112-18 (doctors who perform non-medically indicated abortions may assert patients' constitutional rights); 429 U.S. at 194-97 (female beer vendor allowed to asset equal protection challenge of male beer drinkers); Irving v. Clard, 758 F.2d 1260, 1267 (8th Cir. 1985) (child of deceased landowner permitted to assert parent's fifth amendment just

compensation claim). To determine whether such an assertion should be allowed, the court should consider two factors: (1) the relationship of the litigant to the person whose right he or she seeks to assert, and (2) the ability of the third person to assert his or her own right. Singleton, 428 U.S. at 114-16." Elias v. Department of State, 721 F. Supp. 243, 246 (N.D. Ca. 1989). Also this court has noted: "in certain circumstances " the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. ...the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases. See, e.g., Griswold v. Connecticut, (Planned Parenthood official and a licensed physician can raise the constitutional rights of contraceptive users with whom they had professional relationships); Craig, (licensed beer vendor has standing to raise the equal protection claim of a male customer challenging a statutory scheme prohibiting the sale of beer to males under the age of 21 and to females under the age of 18); Triplett, (attorney may challenge an attorney's fees restriction by asserting the due process rights of the Client)." Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991), (citations omitted).

First we look at the relationship of the litigant to the person whose right the Petitioner seeks to assert. In this instant the Petitioner is the legal representative of the third party whose

right the Petitioner seeks to assert. The legal representative not only has a right to assert this third party right but more likely a legal duty to assert all the rights of the person he represents. The effective legal representation is inextricable bound up with the activity the Petitioner wishes to pursue. The relationship between the Petitioner and the third party is such that the Petitioner is fully, or very nearly, as effective a proponent of the right as the third party. The confidential nature of the relationship between the Petitioner and the third party were such that the rights of the third person were likely to be diluted or adversely affected if they could not be asserted is such a case. Singleton v. Wulff, 96 S. Ct. 2868, 2874 (1976). See also Eisenstadt v. Baird, 405 U.S. 438, 445-446, 92 S. Ct. 1029, 1034, 31 L.Ed. 349 (1972) (stressing advocate relationship and impact of the litigation on the third-party interests).

The other factual element to which the Court has looked is the ability of the third party to assert his own right. In this instant, the third party engages the Petitioners to assert its right before the Secretary. Generally, the third party is a person that comes before the Secretary claiming to be disabled. Often the third party has limited education to allow him to assert his own rights and no funds to pay for adequate legal representation. The closeness of the relationship and nature of relationship, legal representative and client, makes it proper for Petitioner to assert the legal rights of the third party.

Therefore, for reasons stated above, representatives may assert the right of the claimants they represent.

The right of the persons that Petitioner represents before the Secretary to have access to the courts free of any government restraint or interference has been restrained and infringed upon by the challenged statute because it works to limit meaningful access to the courts. "At issue here is the basic right to...legal action. ...(T)hat collective activity undertaken to obtain meaningful access to the courts is a fundamental right with the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." United Transportation Union v. State Bar of Michigan, 410 U.S. 576, 91 S.Ct. 1076, 1082 (1971). Petitioner is the first option many persons have in gaining meaningful access to the courts. If a person received ineffective legal representation or was unable to retain any legal representation at the hearing before the Secretary, then his access to the courts has already been restrained because the decision of the Secretary is only reviewable by the courts to determine if the Secretary's decision is supported by substantial evidence.

The Court of Appeals below noted: "Jones has not established that he has a clear right to relief. Jones fails to allege that the Secretary ever denied him payment for his representation of a social security claimant, that he ever requested such payment,

or that he has in fact represented a claimant who was determined to be entitled to past-due benefits under the Act. Thus, there is an insufficiently real and concrete dispute with respect to application of the challenged provision." First, it is well established that pro se complaints are to be construed liberally by the courts. Secondly, this court has noted: "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Northeastern Florida Contractors v. Jacksonville, 113 S.Ct. 2297, 2303 (1993), (underlining added).

B. Whether jurisdiction is proper in district court pursuant to mandamus statute, 28 U.S.C.A. section 1361.

The mandamus statute, 28 U.S.C.A. section 1361, states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the

United States or any agency thereof to perform a duty owed to the plaintiff."

The Secretary has a duty under the equal protection provision of the fifth amendment to treat the Petitioner equally in providing and withholding benefits to representatives of claimants who are attorneys as well as to those who are not attorneys. Equal justice for all is Petitioner's constitutional right. "Once the nature of defendants' duty is determined, the performance of that duty by defendants' is absolute; they have no discretion to do other than the Constitution...require." Linquist v. Bowen, 633 F.Supp. 846, 854 (W.D. Mo. 1986). The Linquist court further noted that "mandamus is available even if there is a dispute about the nature of the legal duty. The essential element of mandamus jurisdiction is that once the duty is defined by the Court, the Agency has no discretion discharging that duty.... (T)he Court observed that whether the Secretary had a clear duty to act would entail an analysis of the merits of appellant's whole case. Therefore, in order to determine whether mandamus jurisdiction is available, the allegations of the complaint are taken as true unless they are patently frivolous. ...(Q)uestions of Congressional intent and constitutional requirements are the essence of this dispute." Id.

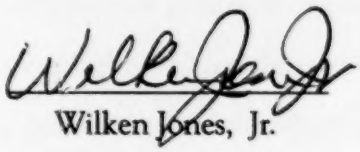
The judiciary has the power to order the Secretary to withhold the fees of representatives of claimants who are non-attorneys from past-due claimants' benefits because of Petitioner's

constitutional claim. "The distinction between constitutional and other challenges to...statutes is well-grounded in the case law. ...Courts are able to grant relief to (Petitioner), even if such relief would contravene congressional enactments, if the (Petitioner) demonstrates a constitutional violation." Wauchope v. U.S. Department of State, 756 F.Supp. 1277 1286 (N.D. Ca. 1991).

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted:



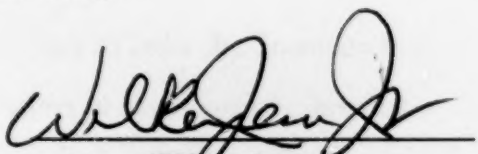
Wilken Jones, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed postage prepaid, on the_____day of June, 1994, to:

(1) Mr. Broadwell, Assistant United States Attorney.
Cheif Division
300 Fannion Street, Suite 3201
Shreveport, LA 71101-3068

(2) Donna E. Shalala, Secretary of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201



Wilken Jones, Jr

APPENDIX A

United States District Court
Western District of Louisiana

LAFAYETTE-OPELOUSAS DIVISION

Wilken Jones, Jr., and other similarly situated representatives of claimants,
Plaintiff

Versus

Civil Action No. 92-1365
Date Filed : July 16, 1992

United States Department of Health and Human Service, and the United States of America.
Defendants.

PETITION FOR JUDICIAL REVIEW

The Petition of the Plaintiff, Wilken Jones, Jr., through himself, respectfully represents as follows:

1. Plaintiff files this civil action seeking judicial review of a statute, 42 U.S.C.A. section 406 (a) : "Representation of claimants before the Secretary", as it relates to the unequal protection of persons representing claimants before the Secretary.

2. Plaintiff challenges the constitutionality of the statute, 42 U.S.C.A. 406 (a), which states in pertinent part: ". . . the Secretary . . . shall, if the claimant was represented by an attorney, in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, for payment (out of such past-due benefits) to such attorney . . . ." (Underlining added). No similar provision is made for other representatives of claimants.

This unequal treatment of representatives entitled to represent claimants before the Secretary violates the equal protection clause of the Fifth and Fourteen Amendments.

3. Plaintiff seeks a judgment from this court declaring that the statute is unconstitutional and a decree enjoining the Secretary from prohibiting non-attorneys representing claimants from having their fees withheld out of claimants past-due benefits as is the case with attorneys representing claimants.

4. Jurisdiction in this court is proper pursuant to: mandamus statute, 28 U.S.C.A. section 1361; federal question under 28 U.S.C.A. section 405 (g).

Plaintiff

5. Plaintiff, Wilken Jones, Jr., is a citizen of Louisiana. Plaintiff is para-legal engaged in providing services to claimants before the Secretary. Plaintiff has been recognized by the Secretary, in accordance with 42 U.S.C.A. 406 (a), that he is of good character and in good repute, possessed of the necessary qualifications to enable him to render such claimants valuabe service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

6. Plaintiff has a fundamental interest in this action under the equal protection clause of the fourteenth and fifth amendment which provides a right of each person to constitutional guarantee of equal protection under the law.

7. Plaintiff is directly and adversely affected by the statute.

Wherefore, Plaintiff prays that the Court:

A. Declare the statute, 42 U.S.C.A. 406 (a), invalid because it violates the equal protection clause of the Fourteenth and Fifth Amendments.

B. Order and direct the Secretary to treat all representatives of claimants equally as it relates to the withholding of fees from claimants' past-due benefits for services provided.

C. Award the Plaintiff all costs of this action.

D. Grant such other relief as the court may deem appropriate.

Respectfully submitted,

_____

Wilken Jones, Jr.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

WILKEN JONES, JR., et al, 92-1365	* CIVIL ACTION NO.
Plaintiffs,	* CV 92-1365
vs.	* JUDGE HAIK
DONNA E. SHALALA, TYNES SECRETARY OF HEALTH AND HUMAN SERVICES	* MAGISTRATE JUDGE * * DATE OF JUDGEMENT
Defendant.	* JULY 1, 1993

JUDGEMENT

The Court having considered the memoranda and argument of counsel,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the United States Department of Health and Human Service's Motion to Dismiss is GRANTED; that plaintiff's Motion for Summary Judgement is DENIED; and that plaintiff's complaint is DISMISSED WITH PREJUDICE.

Thus Done and Signed in Lafayette, Louisiana this 1st day of July, 1993.

RICHARD T. HAIK
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5129

(Summary Calendar)

Date 3-22-94

WILKEN JONES, JR., and other similarly situation representatives of claimants,

Plaintiff-Appellant,

versus

U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(6: 92-CV-1365)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:

Plaintiff Wilken Jones, Jr., brought suit against the Secretary of Health and Human Services ("the Secretary"), alleging that the Social Security Act deprives non-attorneys who represent Social Security Claimants of equal protection.[1] The Secretary moved to

Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has detrermined that this

dismiss for lack of subject matter jurisdiction, and Jones moved for summary judgement. The district court summarily granted the Secretary's motion. Jones contends on appeal that mandamus jurisdiction is proer under 28 U.S.C. S 1361.

Section 1361 vests district courts with original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." "Before mandamus is proper, three elements must generally co-exist. A plaintiff must show a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other adequate remedy is available." Green v. Heckler, 742 F.2d 237, 241 (5th Cir. 1984).

Jones has not established that he has a clear right to relief. Jones fails to allege that the Secretary ever denied him payment for his representation of a social security claimant, that he ever requested such payment, or that he has in fact represented a claimant who was determined to be entitled to past-due benefits under the Act. Thus, there is an insufficiently real and concrete dispute with respect to application of the challenged provision. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289,

---

opinion should not be published.

The Act provides that

if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Secretary shall . . . certify for payment out of such past-due benefits . . . to such attorney and amount equal to so much of the maximum fee as does not exceed 25 percent of such past due benefits. . . .

42 U.S.C. S 406 (a) (4) (A) (1988).

305, 99 S. Ct. 2301, 2312, 60 L. Ed. 2d 895 (1979). Moreover, it is not clear that the statutory classification, "which neither proceeds along suspect lines nor infringes fundamental constitutional rights," can not be supported by "any reasonably conceivable state of facts that could provide a rational basis for the classification." F.C.C. v. Beach Communications, Inc., _____ U.S. 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993). Consequently, Jones has failed to establish that the Secretary has a clear duty to compensate him out of an award of past-due benefits.

For the foregoing reasons, we AFFIRM the judgement of the district court. 3-22-94 Date of Judgement

The Social Security Act, 42 U.S.C., provides in pertinent part:

406. Representation of claimants before Secretary

(a) Recognition of representatives; fees for representation before Secretary

(a)(1) The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Secretary, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibit from further practice before him any such person, agent, or attorney who refuses to comply with the Secretary's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connec-

tion with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him connection with such claim.

(2)(A) In the case of a claim of entitlement to 25 past-due benefits under this subchapter, if-

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Secretary prior to the time of the Secretary's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser- of-

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant,

then the Secretary shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Secretary may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date, The Secretary shall publish any such increased amount in the Federal Register.

(B) For purposed of this subsection, the term "past due benefits" excludes any benefits with respect to which payment has

been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In the case of a claim with respect to which the Secretary has approved an agreement pursuant to subparagraph (A), the Secretary shall provide the claimant and the person representing the claimant a written notice of-

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Secretary shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (@) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(C)-

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Secretary to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Secretary to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Secretary to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the

claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(iii) the determination is favorable to the claimant, then the Secretary shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Secretary may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate or increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Secretary shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In the case of a claim with respect to which the Secretary has approved an agreement pursuant to subparagraph (A), the Secretary shall provide the claimant and the person representing the claimant and the person representing the claimant a written notice of-

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under this paragraph (3).

(3)(A) The Secretary shall provide by regulation for review of the amount which would otherwise be the maximum fee

as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(C)-

(i) the claimant, or the administrative law judge or other adjudicator who make the favorable determination, submits a written request to the Secretary to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Secretary to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Secretary to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the Secretary determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Secretary for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Secretary or by an administrative law judge or other person (other than such adjudicator) who is designated by the Secretary.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee.

Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4)(A) Subject to subparagraph (B), if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Secretary shall, notwithstanding section 405(i) of this title, certify for payment out so such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title).

(B) The Secretary shall not in any case certify any amount for payment to the attorney pursuant to this paragraph before the expiration of the 15-day period referred to in paragraph (3)(A) or, in the case of any review conducted under paragraph (3), before the completion of such review.

(5) Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.